Peluso v Janice Taxi Co. Inc.
2009 NY Slip Op 33284(U)
September 29, 2009
Sup Ct, New York County
Docket Number: 108774/2007
Judge: Paul Wooten
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SCANNED ON 9/28/2009
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN, Justice — PART 22

SAMANTHA PELUSO,

Plaintiff,

- v -

JANICE TAXI CO. INC., NICOLAS CAAMO, VAULT and CHRISTOPHER PELUSO,

Defendants.

INDEX NO. 108774/2007

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. 72

The following papers, numbered 1 to 4 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

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On February 5, 2005, plaintiff Samantha Peluso ("plaintiff"), while a passenger in a vehicle owned by defendant Vault and operated by defendant Christopher Peluso, was involved in a motor vehicle accident with a vehicle owned by defendant Janice Taxi Co. Inc. ("Janice Taxi") and operated by defendant Nicolas Caamo. The accident occurred on Fifth Avenue near its intersection with East 42nd Street in New York County, New York. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed on July 25, 2008. Defendants Janice Taxi, Nicolas Caamo and Christopher Peluso (collectively "defendants") now move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of "serious injury," pursuant to Insurance Law §

5102 (d).[1]

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101 *et seq.* - the "No-Fault Law"), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). Insurance Law § 5102 (d) defines "serious injury" as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system ["permanent loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment ["90/180-day"].

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104 [a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, a plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

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[1]Defendants Janice Taxi and Nicolas Caamo filed their motion for summary judgment on June 11, 2008. Defendant Christopher Peluso moved for permission to join in the summary judgment motion on July 2, 2008.

Plaintiff alleges that the motor vehicle accident resulted in permanent injuries to her back and neck, which include herniated and bulging discs, cervical/lumbar radiculopathy and cervical/lumbar/thoracic spine strain and sprain (see defendants' motion, exhibit C, bill of particulars at ¶ 11). Within the bill of particulars, she claims a "serious injury" under the following relevant categories: (1) permanent loss; (2) permanent consequential limitation; (3) significant limitation; and (4) 90/180-day.[2] (*Id.* at ¶ 20.) The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories.

SUMMARY JUDGMENT ON SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102 (d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). Reports by

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[2]The bill of particulars also alleges a serious injury under the categories of fracture and significant disfigurement. These categories will not be considered as the record contains no indication of such injury.

a defendant's own retained physician, however, must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). Moreover, CPLR 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

A defendant can meet the initial burden of establishing a prima facie case of the nonexistence of a serious injury by submitting the affidavits or affirmations of medical experts who examined plaintiff and opined that plaintiff was not suffering from any disability or consequential injury resulting from the accident (*see Gaddy*, 79 NY2d at 956-57; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *see also Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept 2001] [defendant's medical expert must set forth the objective tests performed during the examination]). A defendant can also demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the injuries were not, in any event, causally related to the accident (*see Franchini*, 1 NY3d at 537). A defendant can additionally point to plaintiff's own sworn testimony to establish that, by plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

Plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*see Pagano*, 182 AD2d at 270; *Bonsu v Metropolitan Suburban Bus Auth.*, 202 AD2d 538, 539 [2d Dept 1994]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit plaintiff to rely upon the same reports (*see Ayzen v Melendez,* 299 AD2d 381, 381 [2d Dept 2002]). Submissions from a chiropractor must be by affidavit because a chiropractor is not a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Moreover, an expert's medical report may not rely upon inadmissible medical evidence, unless the expert establishes serious injury independent of said report (*see Friedman v U-Haul Truck*

Rental, 216 AD2d 266, 267 [2d Dept 1995]; *Rice v Moses*, 300 AD2d 213, 213 [1st Dept 2002]).

In order to rebut defendant's prima facie case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *see also Toure*, 98 NY2d at 350). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of plaintiff's serious injury (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418, 419 [1st Dept 1998]). "However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 AD2d at 84; *see also Arjona*, 7 AD3d at 280; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]). A physician's conclusory assertions based solely on subjective complaints cannot establish a serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

Plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of a plaintiff's loss of range of motion"; or qualitative assessment of a plaintiff's condition, "provided that the evaluation has an

objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure*, 98 NY2d at 350). The medical submissions must specify when and by whom the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether plaintiff's limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317, 317 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]).

Further, a plaintiff who claims a serious injury based on the "permanent loss" category has to establish that the injury caused a "total loss of use" of the affected body part (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

The "permanent consequential limitation" category requires a plaintiff to establish that the injury is "permanent," and that the limitation is "significant" rather than slight (*see Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). Whether an injury is "permanent" is a medical determination, requiring an objective basis for the medical conclusion of permanency (*see Dufel*, 84 NY2d at 798). Mere repetition of the word "permanent" in the physician's affirmation or affidavit is insufficient. (*See Lopez*, 65 NY2d at 1019.)

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use" (*Licari*, 57 NY2d at 236). In evaluating both "permanent consequential limitation" and "significant limitation," "[w]hether a limitation of use or function is 'significant' or 'consequential' . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel*, 84 NY2d at 798). Moreover, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman*, 202 AD2d at 265).

The 90/180-day category requires a demonstration that plaintiff has been unable to

perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.)*. A physician's statement that is too general and non-specific does not support a 90/180-day claim (*see e.g. Morris v Ilya Cab Corp.*, 61 AD3d 434, 435 [1st Dept 2009]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

Finally, "even where there is objective medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommels v Perez*, 4 NY3d 566, 572 [2005]). Accordingly, a plaintiff is required to offer a reasonable explanation for a "gap in treatment" *(id.* at 574; *Delorbe v Perez*, 59 AD3d 491, 492 [2d Dept 2009]; *DeLeon v Ross,* 44 AD3d 545, 545-46 [1st Dept 2007]*; Wadford v Gruz*, 35 AD3d 258, 258-59 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]).

DISCUSSION

In support of the summary judgment motion, defendants submit, *inter alia*, the affirmed medical report of neurologist Dr. Charles Bagley dated April 22, 2008; the unaffirmed medical report of orthopedist Dr. Julio Westerband dated April 21, 2008; affirmed reports of Dr. David L. Milbauer, affirming reviews of MRIs of plaintiff's lumbar, cervical and thoracic spine; plaintiff's March 6, 2008 deposition; and plaintiff's bill of particulars. *(See* defendants' motion, exhibits B, C, D, E, F.)

Dr. Bagley conducted a neurological independent medical examination ("IME") of plaintiff on April 22, 2008. Dr. Bagley noted that plaintiff reported a prior accident in 1997 that resulted in a neck injury. Dr. Bagley's examination of plaintiff's cervical spine revealed normal

range of motion. Distraction test and compression were negative. The thoracic spine showed no tenderness to palpation over inferior angle or over the spinous process from T1 through T12. The thoracic curvature was normal with no paraspinal spasm. The lumbar spine range of motion was self restricted by plaintiff with flexion to 75 degrees (90 degrees is normal), extension to 25 degrees (30 degrees is normal), bilateral rotation to 30 degrees (30 degrees is normal), right lateral flexion to 20 degrees (30 degrees is normal) and left lateral flexion to 30 degrees (30 degrees is normal) with no complaint of pain. Straight leg raising test was negative to 80 degrees (80 degrees is normal). No muscle spasms were noted. There was no tenderness noted over the lumbar spinal muscles. Dr. Bagley opined that the neurological examination was normal; that plaintiff is not neurologically disabled; and that plaintiff can work and perform all of her normal daily activities without restriction.

Dr. Westerband performed an orthopedic IME of plaintiff on April 21, 2008, and opined that plaintiff had a normal examination of the cervical spine, thoracic spine, lumbar spine, left elbow, left wrist and left knee. Dr. Westerband concluded that there was no evidence of permanent disability and that plaintiff can perform her activities of daily living without any limitations. The attestation section of Dr. Westerband's report provided:

> "I, Julio Westerband, M.D., being an orthopedist, duly licensed to practice medicine in the State of NY, pursuant to the applicable provisions of the Civil Practice Law and Rules section 2106, hereby affirm that the claimant was examined according to the restricted rules concerning an independent medical examination" (defendants' motion, exhibit E).

Dr. Milbauer reviewed plaintiff's prior MRIs and opined that a March 15, 2005 MRI of the lumbar spine revealed diffuse degenerative disc bulging at L5-S1 and minor disc bulging elsewhere, without significant compromise of the canal or neural foramina throughout; a March 15, 2005 MRI of the cervical spine showed minor degenerative disc bulges at multiple levels; and a May 16, 2005 MRI of the thoracic spine revealed mild scoliosis and minor degenerative changes of the thoracic intervertebral discs. Dr. Milbauer concluded that there were no findings

to indicate that a traumatic injury of the lumbar spine or cervical spine was sustained in the accident, and that the bulging discs were degenerative in etiology and preexisted the accident. Straightening of the cervical lordosis was nonspecific and might have been positional in nature. Dr. Milbauer also concluded that there were no findings indicating that a traumatic injury of the thoracic spine was sustained in the accident, and that the findings were unrelated to trauma.

In the bill of particulars, plaintiff asserts that she was confined to bed for 2 days and to home for 3 weeks following the accident (bill of particulars at ¶ 13). She also alleges incapacity from employment for 3 weeks (*id.* at ¶ 14). She makes no claim for lost wages.

Plaintiff testified at her deposition that she was working as an Accounts Director at the time of the accident, and lost 3 to 4 weeks from work due to her injuries (plaintiff's deposition at 52). When asked about activities that she could do before the accident but could not do at all now, plaintiff stated that she could not stand in one place for a long time (*id.* at 38). Activities that she had difficulty doing now included vacuuming, sleeping, sitting in an airplane seat, playing football, running, weightlifting and the elliptical machine (*id.* at 39-40, 42-45.) Plaintiff also testified that she was part of a women's football team at the time of the accident and lost two seasons playing for them (*id.* at 39-42). Plaintiff could not recall the last time she was treated for her injuries, but believed it was later than April 29, 2005 (*id.* at 58-59).

Based on the foregoing, the Court finds that defendants have sustained their burden of establishing a prima facie case that plaintiff did not suffer a "serious injury" under the categories of permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]). Dr. Westerband's report is inadmissible since it fails to comply with CPLR 2106, which requires a physician's statement to be affirmed "to be true under the penalties of perjury" (*see Offman v Singh*, 27 AD3d 284, 284 [1st Dept 2006]; *Pagano*, 182 AD2d at 270). However, based on the remaining submissions, defendants have proffered sufficient objective medical evidence demonstrating that plaintiff has normal range of motion and suffers from no

neurological disability resulting from the accident. (*See Gaddy*, 79 NY2d at 956-57 [defendant established prima facie case "through the affidavit of a physician who examined [the plaintiff] and concluded that she had a normal neurological examination"); *Gorden*, 50 AD3d at 462-63 [defendants met initial burden where affirmed reports of orthopedist and neurologist, made after a review of plaintiff's medical records and a personal examination, stated that plaintiff did not suffer from a neurologic or orthopedic disability and that the injuries were resolved]).

Defendants have also sustained their initial burden of proof with regard to the 90/180-day category. A defendant can establish the nonexistence of a serious injury under 90/180-day absent medical proof by citing to evidence, such as the plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting his or her usual and customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]).

Defendants' proffer of plaintiff's own testimony sufficiently demonstrates that the injuries did not prevent plaintiff from performing "substantially all" of her usual and customary daily activities for the requisite time period (*see Licari*, 57 NY2d at 236). Plaintiff's deposition and bill of particulars indicate that she missed only 3 to 4 weeks of work due to her injuries. Plaintiff also asserts in her bill of particulars that she was confined to bed for just 2 days and to home for only 3 weeks. These time periods are far less than the 90/180 days required by the statute, and are sufficient to meet defendants' burden of establishing a prima facie case. (*See Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 664-65 [2d Dept 2008] [defendants made prima facie showing that plaintiff did not sustain a serious injury under 90/180-day category through plaintiff's deposition testimony that he missed only five weeks of work); *Camacho v Dwelle*, 54 AD3d 706, 706 [2d Dept 2008] ["by submitting the plaintiff's deposition testimony that he missed only 15 days of work as a result of the accident, the defendants demonstrated that the plaintiff was able to perform 'substantially all' of the material acts

constituting his customary daily activities for more than 90 days of the first 180 days subsequent to the accident"]; *Copeland*, 6 AD3d at 254 [home and bed confinement for less than the prescribed period evinces lack of serious injury under 90/180-day category]).

Since the Court finds that defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiff to produce evidentiary proof in admissible form establishing the existence of a genuine issue of fact (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, the affirmed medical report of treating physician Dr. Gideon Hedrych dated July 25, 2008; unaffirmed medical records and MRI reports; a March 28, 2006 letter from High Point Insurance ("High Point"); plaintiff's August 6, 2008 affidavit; and a portion of plaintiff's deposition testimony. (*See* plaintiff's affirmation in opposition, exhibits A, B, C, D, E, F, G, H, I, J.)

Dr. Hedrych's July 25, 2008 report discusses his examinations of plaintiff on February 9, 2005 and July 25, 2008. At the February 9, 2005 examination, plaintiff's cervicodorsal spine range of motion revealed pain, with limitation of flexion to 25-30 degrees (normal is 45 degrees), of extension to 20-25 degrees (normal is 45 degrees), of lateral flexion to the right to 15-20 degrees (normal is 45 degrees), and to the left to 20-25 degrees (normal is 45 degrees), of rotation to the right to 35 degrees (normal is 80 degrees) and to the left to 35-40 degrees (normal is 80 degrees). There was moderate right paravertebral muscle and trapezius muscle spasm and moderate to marked left paravertebral muscle, trapezius muscle, and suprascapular muscle spasm from C3 to T4-5, with tenderness on the left. Examination of the dorsolumbar spine range of motion revealed pain, with limitation of flexion to 40 degrees (normal is 80 degrees), of extension to 5-10 degrees (normal is 20 degrees), of lateral flexion to the right to 10-15 degrees (normal is 20 degrees) and to the left to 10 degrees (normal is 20 degrees), of rotation to the right to 10-15 degrees (normal is 30 degrees) and to the left to 10-15 degrees

(normal is 30 degrees). There was moderate to marked bilateral paravertebral muscle and infrascapular muscle spasm from T10 to S1, with tenderness over the paravertebral muscles, left side greater than right. Dr. Hedrych's diagnosis was: 1. Cervicodorsal spine derangement with traumatic myofascitis; 2. Cervical radiculopathy and/or myelopathy; and 3. Lumbosacral spine derangement with traumatic myofascitis, consider lumbar radiculopathy.

Dr. Hedrych's report also references plaintiff's MRIs, and indicates that the March 15, 2005 MRI of the cervical spine showed kyphotic cervical curvature and C3/4 posterior disc bulge with ventral CSF impression. The March 15, 2005 MRI of the lumbosacral spine revealed L5/S1 posterior disc herniation. The May 16, 2005 MRI of the thoracic spine showed slight scoliosis; mild depression of the superior end-plate of the T7 vertebral body without evidence of underlying intrinsic lesion or edema; and posterior disc bulges at T6-7 and T11-12 levels, which were each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally.

At the July 25, 2008 examination, plaintiff's cervicodorsal spine range of motion revealed pain, with limitation of flexion to 30-35 degrees (normal is 45 degrees), of extension to 15 degrees (normal is 25 degrees), of lateral flexion to the right to 15-20 degrees (normal is 45 degrees) and to the left to 15 degrees (normal is 45 degrees), of rotation to the right to 40-45 degrees (normal is 80 degrees) and to the left to 40 degrees (normal is 80 degrees). There was moderate right and moderate to marked left paravertebral muscle and trapezius muscle spasm, with tenderness bilaterally. Examination of the dorsolumbar spine range of motion revealed pain, with limitation of flexion to 55-60 degrees (normal is 80 degrees), of extension to 5 degrees (normal is 20 degrees), of lateral flexion to the right to 10 degrees (normal is 20 degrees) and to the left to 5-10 degrees (normal is 20 degrees), of rotation to the right to 15 degrees (normal is 30 degrees) and to the left to 10-15 degrees (normal is 30 degrees). There was moderate to marked right and marked left paravertebral muscle and infrascapular muscle

[* 13]

spasm. Dr. Hedrych's diagnosis was: 1. Cervical spine derangement with bulging disc at C3-4; 2. Cervical radiculopathy and probable cervical myelopathy; 3. Dorsal spine derangement with bulging discs at T6-7 and T11-12, each encroaching upon the lateral recesses bilaterally, producing probable radiculopathy and possible myelopathy; 4. Lumbosacral spine derangement with herniated disc at L5/S1; and 5. Lumbar radiculopathy. Dr. Hedrych concluded that plaintiff had a significant consequential loss of use and limitation of motion in her cervical, dorsal and lumbosacral spine; that plaintiff had a permanent disability due to the injuries; that the injuries have altered plaintiff's ability to function as she did prior to the accident and would result in chronic and exacerbative symptoms with limitations upon her activities of daily living; and that plaintiff's condition was causally related to the injuries sustained in the accident.

The unaffirmed medical records consist of: (1) medical reports by Dr. Hedrych dated February 9, 2005 to April 29, 2005; (2) a medical report from Dr. Hildegarde Geisse dated February 16, 2005; (3) medical reports from Dr. Ofra Blonder dated February 10, 2005 to April 7, 2005; and (4) the MRI reports of plaintiff's lumbar, cervical and thoracic spine, which were the same studies referenced by Dr. Hedrych and reviewed by defendants' expert.

The letter from High Point, an insurance company, is addressed to plaintiff and references an examination by Dr. Robert Zaretsky on March 14, 2006, resulting in a report by Dr. Zaretsky showing that plaintiff had reached maximum medical improvement from orthopedic treatment. High Point requested submission of the final medical bills through April 18, 2006, and discontinued coverage for orthopedic treatment after that date.

In her affidavit, plaintiff states that she led a very active lifestyle prior to the accident and exercised at the gym, lifted weights, did aerobic workouts and played professional football. After the accident, she was not able to perform her usual workouts, run, weightlift, use the ellipitical machine or participate in the team training sessions as she did prior to the accident.

She missed the entire 2005 and 2006 football seasons due to her injuries. She also had difficulty sitting for prolonged periods of time, bending, turning her head, lifting heavy objects, walking without pain and sleeping. She also indicated that she missed 3 to 4 weeks of work due to her injuries.

Plaintiff additionally asserts in her affidavit that she stopped physical therapy in February 2006. She states that when the no-fault insurance company decided to cut off her benefits, she could no longer obtain much needed treatment from her doctors.

With the exception of the MRIs, none of the unaffirmed medical evidence submitted by plaintiff is admissible (*see Pagano*, 182 AD2d at 270). It is well settled that a plaintiff may not rely upon *unsworn* medical evidence to defeat a defendant's summary judgment motion (*see Migliaccio v Miruku*, 56 AD3d 393, 394 [1st Dept 2008] ["Statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment."]; *Copeland*, 6 AD3d at 254; *DeJesus v Paulino*, 61 AD3d 605, 607 [1st Dept 2009]; *Shinn*, 1 AD3d at 197). The Court will, however, consider the unsworn MRIs since these are the same MRIs that were reviewed by defendant's expert (*see Ayzen*, 299 AD2d at 381).

Considering the remaining evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court finds that plaintiff has raised a triable issue of fact as to whether she sustained a "serious injury" under the categories of permanent loss, permanent consequential limitation or significant limitation sufficient to defeat defendants' summary judgment motion (*see* Insurance Law § 5102 [d]). Dr. Hedrych's report includes contemporaneous and recent range of motion testing revealing significant limitations in the range of motion of plaintiff's cervicodorsal and dorsolumbar spine. Dr. Hedrych concludes that plaintiff has significant consequential loss of use and limitation of motion in her cervical, dorsal and lumbosacral spine; that plaintiff has a permanent disability

due to her injuries; and that the injuries were caused by the subject accident. The MRIs reveal disc bulges at C3/4, T6-7 and T11-12 and disc herniation at L5/S1. These submissions are sufficient to raise a triable issue of fact (*see Nunez*, 60 AD3d at 560; *Delorbe*, 59 AD3d at 491-92; *Gutierrez v Yonkers Contracting Co.*, 61 AD3d 823, 823-24 [2d Dept 2009]; *Crespo v Aparicio*, 59 AD3d 384, 384-85 [2d Dept 2009]; *Wagenstein v Haoli*, 64 AD3d 584, 584 [2d Dept 2009]).

The Court further finds, however, that plaintiff has not raised an issue of fact under the 90/180-day category (*see Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Plaintiff has not established a sufficient limitation of "substantially all" of her customary and daily activities for the required 90/180-day time period. Plaintiff admits that she missed just 3 to 4 weeks of work, and was only confined to bed for 2 days and to home for 3 weeks. In any event, the limitations of which she complains -- *i.e.*, limitations on activities such as exercising, playing on a football team, sitting prolonged periods, lifting heavy objects, sleeping and bending -- do not constitute a curtailment of "substantially all" of her usual and customary daily activities sufficient to support a 90/180-day claim. (*See Alloway v Rodriguez*, 61 AD3d 591, 592 [1st Dept 2009] ["plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities for at least 90 days of the 180 days following the accident"); *Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005] [although there was evidence that plaintiff could not participate in some activities, such as gym class and dancing, plaintiff raised no triable issue as to 90/180-day claim where plaintiff returned to school after a week and to work after five weeks]; *Rennell v Horan*, 225 AD2d 939, 940 [3rd Dept 1996] ["even accepting that plaintiff had to curtail some of her activities and sports, the record failed to show that such restrictions were medically indicated or affected a significant portion of her usual activities"]).

Lastly, although the admissible evidence reveals a gap in treatment from 2005 until 2008, the Court elects not to dismiss the complaint on this basis (*see Pommells*, 4 NY3d at

574). Plaintiff's affidavit indicates that she discontinued her treatment when her no-fault insurance benefits were cut off. In addition, plaintiff submits a letter from an insurance company indicating that insurance coverage for orthopedic treatment was discontinued as of April 18, 2006. The Court finds these submissions sufficient to explain the gap in treatment based on discontinuance of insurance benefits (*see Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008] ["The plaintiff adequately explained the significant gap in her treatment history by stating in her affidavit that she stopped treatment about four to five months after the subject accident because her no-fault insurance was cut off and she could not afford to personally pay for further treatment."]; *Wadford*, 35 AD3d at 258-59 [plaintiff explained gap in treatment by indicating that she discontinued therapy when no-fault insurance was discontinued and where her physician noted that she had reached maximum medical improvement]; *Delorbe*, 59 AD3d at 492; *Gutierrez*, 61 AD3d at 824; *Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]).

Accordingly, summary judgment with respect to plaintiff's claim of a "serious injury" under the categories of permanent loss, permanent consequential limitation and significant limitation is denied. Summary judgment dismissing the complaint under the 90/180-day category is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is denied, except as to plaintiff's 90/180-day claim which is dismissed; and it is further,

ORDERED that the Clerk of the Court is directed to enter partial summary judgment in favor of all defendants on the 90/180-day claim, without costs and disbursements to defendants as taxed by the Clerk; and it is further,

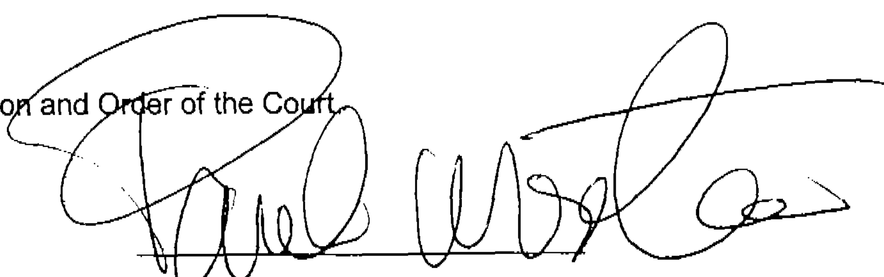
ORDERED that plaintiff shall serve any and all pre-trial notices and any HIPPA authorizations within five days of this order and a final pre-trial/settlement conference shall take

[* 17]

place on October 8, 2009 at Part 22, 80 Centre Street, Courtroom 136, New York, New York 10013, and the case is scheduled for trial on November 19, 2009 at Part 40, 9:30 am 60 Centre Street, Courtroom 242, New York, New York 10013; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.



Dated: September 21, 2009

SEP 21 2009

Paul Wooten J.S.C. Paul Wooten J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FILED
SEP 28 2009
COUNTY CLERK'S OFFICE
NEW YORK